No. 157.

In Error

HENRY G. KING, Plaintiff in Error,

vs.

M. B. MULLINS, ALEXANDER McLINTOCK, and JOHN McLINTOCK, Defendants in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

Argument for Plaintiff in Error in Reply to Argument of James H. Peyton, Esq., Filed on Behalf of Certain Persons.

MATTHIAS F. SPILMAN,
Counsel for Plaintiff in Error.

Judd & Detweiler, Printers, Washington, D. C. 10-12-97

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 157.

HENRY C. KING, PLAINTIFF IN ERROR,

vs.

M. B. MULLINS, ALEXANDER McCLINTOCK, AND JOHN McCLINTOCK, DEFENDANTS IN ERROR.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

Argument for Plaintiff in Error in Reply to Argument of James H. Ferguson, Esq., Filed on Behalf of Certain Persons.

Mr. Ferguson in his argument (p. 2) declares that he is not counsel for defendants in error, was not engaged in the trial in the court below, and only performed such preliminary acts in the case as were conformable with his obligation to the cabal of lawyers organized against this plaintiff in error. In this fact is perhaps found an explanation of his misapprehension of certain things about the case.

It appears to be the hope of counsel for the outsiders, as

well as of counsel for defendants in error, to terrify, if he cannot confuse, the Court and to deter the Court from deciding this cause according to the principles of law that the Court may conceive to govern it, by fear of the effect it is thought by counsel such decision may have upon the interests of his clients. A decision that would defy and confound all existing principles and precedents has no terrors for him, provided his clients be relieved from defending their title or possession as others must do in other states.

If important causes were to be decided by this Court not according to controlling principles of law, but according to the conjectured effect upon persons outside the case, evidence of such effect should be furnished by the record before the Court must ignore the law and guess at the effect of affirming or reversing a judgment. In such case what matter whether statutes be valid or invalid? By what principle or precedent are we to be guided? Surely not by those luminous opinions of this Court that have made it the most august tribunal on earth, for they deal only with the law. How many persons must be advantageously or injuriously affected, and to what degree, to warrant this Court in smothering the Constitution and declaring valid an invalid act or void a valid law? The clamor of counsel, if it were sincere, would amount only to a confession that his clients hold land that they have no hope of retaining unless the State is permitted to transfer to them the title of this plaintiff. It is not to be doubted, however, that at the proper time the people referred to—not a thousand, by the way, but perhaps two hundred, residents, non-residents, and land companies—will promptly avail themselves of the ten-year statute of limitations and be in no worse nor better plight than our fellow-citizens in other states. This is suggested, not because it concerns this Court, but for the comfort it may afford counsel.

OBJECTIONS TO BILLS OF EXCEPTIONS.

Mr. Ferguson makes some hypercritical objections to plaintiff's bills of exceptions. He objects that the evidence on the part of plaintiff appears to have been "offered" instead of "given." If this evidence had not been "given," defendants would not have been put upon their defense, and this cause would not be here. The trial judge and counsel for the parties were not quibbling when these bills were drawn, agreed to and signed. When the case turned upon the rulings excepted to in these bills of exceptions, other features of the case became unimportant, and it was the purpose of counsel for the parties to take up so much of the record only as would present the decisive rulings of the Court unconfused with other matters, as the rules of this Court require. Plaintiff proved *prima facie* title and right of possession, but the *chain* of title is unimportant to this Court, except so much as explains the application of the instruction of the court below. What the particular evidence was that showed payment of taxes by Randall and *bona fide* purchase without notice by plaintiff, except such notice as the land books gave (if any), is also immaterial to this Court. The bill of exceptions is conclusive upon that point, even upon counsel for the outsiders.

Further objection is made that there was no motion to set aside the verdict. This can hardly be made in seriousness. To move the court to set aside a verdict that the court had instructed the jury to return would be to move the court to stultify itself. It was the verdict of the judge and not of the jury.

These objections counsel for defendants in error have not seen fit to raise, and it does not appertain to counsel for the outsiders to do so. It is quite enough for him to deal with questions that concern his clients and not with those that relate only to the particular judgment before the Court.

PURCHASE WITHOUT NOTICE OF FORFEITURE.

The counsel affects to make light of plaintiff's claim to be a purchaser without knowledge or notice of any alleged forfeiture because the land is in "an old-settled country," but he omits to explain how this fact raises or supports any presumption of forfeiture. It would seem to indicate the reverse. Here, again, the bill of exceptions (No. 5) shows that plaintiff was such purchaser without notice, except such as the land books gave, and that question is concluded. It is not shown and does not appear how the land books could give notice. The record book that the code makes *prima facie* evidence of forfeiture of land and which might be said to give notice of forfeiture, if any record does, contains no record or mention of the land in question. This is the record from which the auditor's certificate put in evidence by plaintiff (Record, p. 30) was made. An effort is made (p. 11) to overcome this certificate and the failure of that record to show any forfeiture or delinquency of that land by the suggestion that, the land not being assessed, it would not be delinquent and might be forfeited and that fact not "come to the knowledge" of the auditor. The supposition that all taxes had been paid would seem to be the most natural explanation of the land not appearing upon the record of forfeited lands or of delinquent lands, and such payment would be the irresistible conclusion to be drawn from such record. I have discussed this point in my previous argument (pp. 86, 87), and I only refer further to the provision of law printed at pages 73 and 74 of Mr. Ferguson's argument, which is as follows:

"In order to enable the auditor to make such record (of forfeited lands) it shall be the duty of the clerk of the county court of each county in which any such real estate ought to have been, but was not entered on the land books and charged with taxes thereon, upon discovering any such failure, to certify the same and all the facts in relation thereto to the auditor."

The clerk of the county court of each county makes up the land book each year, and for that purpose uses the land book of the previous year (see pp. 16 and 17 of my former argument for statute), and he alone and no other person *enters* all land that is entered thereon, and he alone *omits* to enter any land that is omitted, and omits to charge any taxes that are not charged. He must carry all land to the new land book, with such change in ownership, if any, as his record discloses, and if he omits to charge any land he must know it and must report it to the auditor with all the facts in relation to it. The most complete provision for the making of this record of forfeited lands is provided, and when we inspect it we have a right to rely upon it and to assume that it is correct, and that the officers and agents of the State, which is but an ordinary proprietor as to such lands, have performed their statutory duty.

The counsel refers the Court to McClure *vs.* Mauperture, 29 W. Va., 633, in order not only to dispute the bills of exceptions in this case, but to impeach by his present testimony the decree of the court in the case cited. That decree recites that Randall, trustee, "has paid to the plaintiff (the commissioner of school lands) this day in open court all taxes, damages, costs, and interest heretofore unpaid thereon and amounting to $8,000.00." That sum included the taxes for which the land had been sold to the State and such as, but for the sale, would have been charged up to and including the year 1883. Judge Ferguson should have learned from his connection with that case, and he would have learned, if he had been counsel for defendants in the court below, that the taxes on this land from 1838 to the formation of West Virginia and afterwards to the time of these tax sales were paid by Randall and prior trustees, and that therefore Randall's exception to the commissioner's report of taxes back to 1839 or to the formation of the State was well taken and properly sustained. The case was then referred to another commissioner, whose report counsel ignores.

The decree referred to does not, as has been said, require Randall to enter the land on the land books, but directs the clerk to certify copies to the auditor and to the assessors that the land might be taxed again. A writ of *mandamus* could have had no greater force. Randall had a right to suppose that this mandate would be and was obeyed. His loss of two or three hundred thousand acres because the officers of the State, whatever their reason, neglected their duty, does not throw Judge Ferguson into hysterics over the "disastrous effect" of the law—his clients hope to get the land. If they succeed by the grace of this spoliation by the State he will, no doubt, lift up his hands and voice in the pious adjuration, "God save the State of West Virginia!"

MISAPPREHENSION OF THE SCOPE OF THIS CASE.

Notwithstanding the fact that there is no ruling of the court nor any assignment of error in the record that relates to any law of Virginia, counsel ascribes to me the ambitious design to overthrow all the forfeiture laws of Virginia and West Virginia (p. 18), even to the undoing of plaintiff's title, which, he says, rests upon a forfeiture.

There could be no greater misapprehension of the question presented by this case. I have not attacked the Virginia law nor does plaintiff's title rest upon it. Counsel cites the act of March 15, 1838 (see p. 60 of his argument), to show that plaintiff claims under a forfeiture, but it appears from that act that, as the State released its title by forfeiture to the trustee to whom Swan had devised his estate and his heirs-at-law had relinquished their interest, the title took the same course that it would have had there been no forfeiture, which, by the way, was for non-payment of taxes, nor any forfeiture law.

I have raised no question, and there is none before this Court, concerning the validity of the Virginia forfeitures or forfeiture laws. On the contrary, I have in my direct argu-

ment of this case (p. 107 and elsewhere) taken the position that the decisions of the Virginia court upon the act of February 27, 1835, while, in my humble opinion, unsound in law and unsustained by any principle, were nevertheless conclusive, but only as to that act. All the adjudications of the Virginia and West Virginia courts refer to the act of 1835, the only statute of any operation forfeiting land for non-assessment that Virginia ever had—one act in a period of 291 years from 1606 to the present time.

The operation and effect of that statute had been settled long before the formation of West Virginia, and while some of the land that came under its operation afterwards formed part of the territory included in West Virginia, that State did not inherit or succeed to that *law* because it had expired by its own terms and had ceased to exist or to have any operation thirty-six years before the organization of West Virginia. It was no more a part of the existing law of Virginia at that time than were the devises, sheriffs' sales, and other transfers of title by which lands in Virginia had been affected. Whether half the titles of the people of West Virginia date back to forfeitures under the act of 1835 and for non-payment of taxes, as stated by counsel (p. 18), I cannot say, nor is it material, for those titles cannot be affected by the decision herein nor disturbed by any court or by any valid legislation. I have discussed the Virginia law upon my direct argument (pp. 104 to 107) and have pointed out the contrast between it and the provision before this Court and shall not enlarge that discussion here.

It is to be observed that the court below, presumably by design, based its instruction upon "the provisions of the constitution of West Virginia" (Record, p. 31) and not upon the code provision of a similar nature, and I have in my direct argument confined myself to the provision of the constitution and to the *record;* but counsel for defendants in error have embraced the code provisions in their discussion. They are not, however, before the Court and are not con-

nected with the constitution and present no points of difference such as to make an examination thereof profitable or interesting. They are invalid to the same extent as the article of the constitution.

CONCERNING REDEMPTION.

The counsel for opposing interests makes great parade of the act of 1893, providing for sale of waste and unappropriated and forfeited lands (pp. 73–78). No question arose under this statute in the court below and none arises here. It is exhibited to beguile this Court with the false suggestion that one whose lands have been "forfeited" has only to come into court, pay up, and regain his land. Counsel, out of all patience with "such people," says: "All the State asks now of these tax dodgers is to come forward, prove their title, pay what they owe to the State, including costs, and take the lands as far as they have not already been disposed of by the State. *What more can such people ask?*"

"As far as they have not already been disposed of by the State" is spoken very softly, but it is important. It is herein that the oppressiveness of the forfeiture is shown, and it is here that the interests of the gentleman's clients lie.

If the constitution had left room for the State to reinstate the forfeited title by redemption or otherwise, the practical hardship to the owner would have been less, but the legal objection to the forfeiture provision would have been just as insurmountable as it is now; but the constitution, by the very same provision which strips the owner of his title, vests that title (in most cases) in other persons beyond the power of the State, by its legislature or any other agency, to restore it upon any terms. The provision for divesting the owner purports to be self-executing; it precludes the notion of legislative aid to give it effect, and it is obvious that the legislature is powerless, by subsequent statute, to avoid or change or undo its operation. It is only such rags and patches, if

any, of the forfeited tract as are not vested in others, but are left in the State, that the State can provide redemption for. While the legislature is apparently expected to provide a method for selling the forfeited land "the title whereto remains in the State" (sec. 4, art. XIII), no proceedings and nothing but the constitution itself is contemplated to forfeit it.

Independent of the insufficiency and invalidity of the cause for forfeiture, this failure to provide for notice and proceedings is fatal to the validity of this article, and manifestly it cannot be cured or helped by anything the legislature may subsequently do. Being invalid when adopted, it must remain so, and can gain no aid from subsequent legislation.

There is an almost unbroken line of authorities that hold that any law which undertakes to deprive a person of property must *itself* provide for notice and hearing. In addition to the citations contained in my direct argument, attention is invited to the two or three following authorities, which might be multiplied indefinitely.

Loesch *v.* Koehler, 144 Ind., 278 (1895):

A statute of Indiana provided that constables, sheriffs, police officers, or agent of any society for prevention of cruelty to animals might kill any animal found neglected or abandoned, and which, in the opinion of three reputable citizens, was injured or diseased past recovery or rendered useless by age, but made no provision for notice to the owner of such animal. Upon an action against an officer for killing horses under the provisions of the statute, some question was made as to the scope of the statute, whether it applied to animals in use by the owner or only to those running loose, but the court said:

"We take it that it can matter little which interpretation is found to be correct, since upon either view the destruction of the animals is provided for without notice, actual or con-

structive, to the owner. By the fundamental law it is provided that no person shall be deprived of his property without due process of law."

The court below had given an instruction that some notice to the owner was necessary, notwithstanding none was provided by the statute, upon which the court says:

"The action of the circuit court in adding to the terms of the statute, it is conceded, could not remedy the omission from the statute."

The statute was held to be invalid. In the discussion of the case the court says:

"In *State vs. Robbins, supra* (124 Ind., 312), this court said: 'It is fundamental that no person can be deprived of any article, which is recognized by the law as property, without a judicial hearing after due notice. No degree of misconduct or wrong can justify the forfeiture of the property of a citizen except in pursuance of some judicial procedure, of which the owner shall have had an opportunity to contest the ground upon which the forfeiture is claimed.'"

Lowry *vs.* Rainwater, 70 Mo., 152:

A statute authorized any judge or justice of the peace upon knowledge or information that any prohibited gaming table or device was kept within his district to cause the same to be brought before him and to be publicly destroyed, but made no provision for judicial condemnation, and the court declared:

"After a careful examination of the 7th section of the act under consideration and numerous adjudications of the courts of other States bearing upon the question involved, we are satisfied that it is in conflict with the 14th amendment to the Federal Constitution, and therefore invalid."

Mr. Lewis, in his treatise on Eminent Domain, sec. 368, after discussing many authorities upon this subject, says:

"There is really but one logical and consistent position in the matter, and that is that a statute that does not provide for notice is invalid."

Counsel for Nighbert and others devotes fifty pages of his argument to a reprint of the laws for assessment and sale of land for taxes from earliest colonial times of Virginia to date, and thereupon makes this observation:

"And now it plainly appears that from 1629 to the present time, a period of 268 years, it has been the 'custom and usage' of the State of Virginia down to 1863, when West Virginia became a State, and of West Virginia from that date to the present, to collect their taxes by distress, a sale of personal property, and by sales of real estate made under statutes passed by the legislatures of both States, and never by judicial process; and if anything can be established by *custom* and *usage* as 'the law of the land,' this manner of collecting taxes has been so established."

On this proposition I quite agree with the counsel, and it appearing that an *assessment* and *sale* of property for taxes has for 268 years met all the exigencies of these States in the matter of revenue, I leave it to counsel for defendants in error to convince him that the same state of facts shows that forfeiture of land *without* assessment or sale is a *revenue* measure, and is "founded in necessity" and "sanctified by long and general usage and consecrated by time."

Yet counsel sets out, it seems, with the notion that article XIII of the Constitution is a tax law, for he asks (p. 18): "What is due process of law in proceedings by a sovereign State in collecting her taxes?" If it is true, as defendants assert, that no taxes have been charged upon the land in question, it would seem to matter little in the present instance what is due process in collecting taxes, since it has no application in a case like the present one; but in my

former argument (pp. 112, 113), to which I refer counsel, I have pointed out certain essentials to due process in such case, tested by which the article before us utterly fails.

THOSE VIRGINIA CASES.

Since the hope of opposing counsel hangs upon the decisions of the Virginia court of appeals on the act of 1835, which are the only ones in the whole wide range of judicial determination that afford them any comfort, let us look past the syllabi and see what there really is in those cases.

Staats' Lessee vs. Board, 10 Gratt., 400; *Wild's Lessee vs. Serpell*, *id.*, 405; *Hale vs. Branscum*, *id.*, 418, and *Smith vs. Chapman*, *id.*, 445, complete the list.

In *Wild's Lessee vs. Serpell* the court holds:

"That the provisions of our statutes" forfeiting land for non-assessment and non-payment of taxes "are within the constitutional competency of the legislature has been sufficiently affirmed in decisions which have been made during the present term of this court in cases arising under these several statutes. *Staats' Lessee vs. Board*, *supra*, 400; *Smith's Lessee vs. Chapman*, *infra*; *Hale vs. Branscum*, *infra*. The same cases also sufficiently establish" that in order to perfect a forfeiture and divest the title out of the owner and vest it in the Commonwealth, no judgment, decree, inquest of office, or other matter of record is necessary.

There is no discussion of the question, it being decided upon the authority of the cases cited, and to them we must look to see by what authority or upon what reasoning the court decides the statutes to be "within the constitutional competency of the legislature."

In *Smith vs. Chapman*, as said by Mr. Ferguson (top p. 87), "the validity of this act was in no way questioned." Nor was it discussed or decided.

In *Hale vs. Branscum* the whole opinion of the court is contained within the compass of a single page, and that

portion that relates to this question is in the following words and figures, to wit:

"It appearing from the facts found in the special verdict that a patent issued to Nathaniel Anderson on the 25th July, 1798, for 1,000 acres of land lying and being in the county of Grayson; that by virtue of the acts of February 27th, 1835 (Sess. Acts, p. 11), and of March 23d, 1836 (Sess. Acts, p. 7), said tract of land became forfeited for the failure to enter same with the commissioner of the revenue and to pay the taxes thereon in the manner prescribed in the second section of the first recited act. The court, for the reasons assigned in the case of *Staats vs. Board, supra*, 400, is of opinion that the forfeiture was complete on the first day November, 1836."

In "the reasons assigned in *Staats vs. Board*" or nowhere must be found a discussion of the principles or precedents upon which the validity of this remarkable statute is sustained, and to that question the following portion of the two-page opinion of the court is devoted, viz:

"It seems to the court here that as by the 52d section of the act of February 9th, 1814, 2 Rev. Code, p. 546, all previous laws forfeiting lands for the failure to enter them on the books of the commissioners of the revenue were repealed, and no provision was made by subsequent laws forfeiting lands for such failure prior to the act of the 27th February, 1835, Sess. Acts, p. 11, no such forfeiture occurred prior to that time.

"It further seems to the court that as by the act of March 23, 1836, Sess. Acts, p. 7, time was allowed until the 1st day of November, 1836, for all persons to cause their omitted lands to be entered with the commissioner of the revenue and to pay the taxes thereon in the manner prescribed in the 2d section of the act of February 27th, 1835, the forfeiture became absolute from and after the 1st of November, 1836; that the provisions of the act of March 30th, 1837, giving time for redemption until the 15th of January, 1838, did not release the forfeitures which had accrued, except in such cases where the owner or proprietor availed himself of the privilege of redeeming.

"And it further seems to the court that such forfeiture became absolute and complete by the failure to enter and pay the taxes thereon in the manner prescribed by the act of February, 1835, and no inquisition or judicial proceedings or inquest or finding of any kind was required to consummate such forfeiture."

Not a single "reason" is "assigned," not an authority cited, not a principle of law invoked in all these cases. The promise that was held out in *Wild vs. Serpell* has failed. The broad highway there pointed out has dwindled to a squirrel track, and that track runs up a tree. The *operation* and *effect* of the statute are stated, but, notwithstanding the statement in Wild *vs.* Serpell that it "has been sufficiently affirmed in decisions which have been made during the present term of court" (mentioning the above causes), that the provisions of the statute "are within the constitutional competency of the legislature," the *validity* of that statute has not in express terms been affirmed or passed upon in those cases. The act was simply *treated* as valid by the court and was for that reason so treated by this Court in *Armstrong vs. Morrill*, 14 Wall., 120, relied upon by opposing counsel, this Court having at that time no power to question a State statute for want of "due process" (*Barron vs. Baltimore*, 7 Pet., 247), and if the Virginia court is to be regarded a holding, by implication, that the statute was not repugnant to the State constitution (it was not expressly prohibited by it) that ruling was binding upon this and all other courts. The validity of that act has never been affirmed by this Court nor the West Virginia forfeiture laws by *any* court except in this case in the court below. So when counsel speaks of "the high and abundant authorities, including the many decisions of this honorable Court in favor of their validity" (p. 18), he performs that linguistic operation obscurely described in current slang as "talking through one's hat."

The constitutionality of the West Virginia forfeiture law was raised and argued in the circuit court of appeals, fourth

circuit, in *Read vs. Dingess*, 60 Fed., 26, in 1893 (decided 1894), Mr. Vinson, of counsel for these defendants in error, opposing the constitutionality, and while the court discussed the question somewhat it did not decide it, remarking (top p. 28): "We do not, however, find it necessary to pass upon the question of constitutionality."

The question was again raised and extensively argued two years later in the same court in Buskirk *vs.* King, 72 Fed., 22, but was not decided; and again in the same court in Bartlett *vs.* Ambrose, 78 Fed., 839, this question was fully argued, but the court, merely noting the question (p. 841), disposed of the case upon other grounds, as it had done with the previous cases; and the question comes here now for the first time, with no decision of any court, except the one to be reviewed, in support of the validity of the law, and no principle or precedent to sustain the contention of defendants in error and no "acquiescence" in the operation or invalidity of the provision. In addition to the argument of counsel for defendants in error, which represents not alone the genius and learning of the gentlemen whose names are thereto subscribed, but is a composite of the research of many other able lawyers, I have consented to the filing of the argument of Judge Ferguson to illustrate how little can be brought to the support of this forfeiture law by so learned, so experienced, and so able a lawyer as he.

Whatever may be our opinions of the Virginia forfeiture law, dead thirty years before "the year of grace 1866," or of the decisions of the courts thereon, we must conclude, with Mr. Justice Jackson, then circuit judge, in *Scott vs. Toledo*, 36 Fed., 385, that--

"Whatever may have been the power of the States on this subject prior to the adoption of the 14th amendment to the Constitution, it seems clear that since that amendment went into effect such limitations and restraints have been placed upon their power in dealing with individual rights that the States cannot now lawfully appropriate private

property for the public benefit or to public uses without compensation to the owner, and that any attempt to do so, whether done in pursuance of a *constitutional provision* or legislative enactment, whether done by the legislature itself or under delegated authority by one of the subordinate agencies of the State, and whether done directly, *by taking the property of one person and vesting it in another or the public*, or indirectly, through the forms of law, by appropriating the property and requiring the owner thereof to compensate himself or to refund to another the compensation to which he is entitled, would be wanting in that 'due process of law' required by said amendment."

Concerning the power of the States to take the private property of one person for the benefit of another it has truly been said:

"It was deemed necessary to insert a special provision in the Constitution to enable them to take private property even for public use, but it was not deemed necessary to disable them specially in regard to taking the property of an individual, with or without compensation, in order to give it to another, not only because the general provision in the bill of rights was deemed sufficiently explicit for that, but because it was expected that no legislature would be so regardless of right as to attempt it." (*Norman vs. Heist*, 40 Am. Dec., 495.)

SOME ADDITIONAL AUTHORITIES.

It has not been and is not my purpose to reargue this cause, but reference to some recent decisions of this Court may be of value.

Missouri Pacific Railway vs. Nebraska Board of Transportation, 164 U. S., 403.

A State statute required railroad company to permit grain elevators to be erected by private persons upon its right of way, and this Court in the conclusion of its opinion epitomizes the law in such case as follows:

"The taking by a State of the private property of one person or corporation without the owner's consent for the private use of another is not due process of law and is a violation of the fourteenth amendment of the Constitution of the United States."

Gulf, Colorado & Santa Fé Railway vs. Ellis, 165 U. S., 150.

Statute of Texas authorizing taxation of an attorney fee as costs against railroad in judgments on certain claims not exceeding fifty dollars invalid.

This Court, speaking by Mr. Justice Brewer, says:

"Unless the legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency, this statute cannot be sustained.

"But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the fourteenth amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this Court in Yick Wo *vs.* Hopkins, 118 U. S., 356, 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play of purely personal or arbitrary power.' * * *

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the equality clause of the fourteenth amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection. Tested by these principles the statute in controversy cannot be sustained."

Tested by these principles the article of the State constitution in controversy cannot be sustained. The classifica-

tion attempted by it is based upon no reasonable ground, no natural and obvious difference between the classes attempted to be made. Only tracts of 1,000 acres and upwards and their owners suffer forfeiture, tracts of less size and their owners in exactly the same situation and predicament being wholly unaffected. Lands pass by devise, descent, and grant, are vested and divested, are valued, assessed, taxed, seized, sold, and in every conceivable manner dealt with by the owner, by the State, and by others in exactly the same manner whether they be of great or small extent, save only in the one respect of forfeiture. Can any reason be pointed out why this selection could not as properly have been made at 900 or 1,100 or 500 or 2,000 acres as at 1,000 acres? To say that "the line must be drawn somewhere" is to admit that it should be drawn nowhere—that the subject is not adapted to the classification sought to be made.

Chicago, Burlington & Quincy R. R. Co. vs. Chicago, 166 U. S., 226 (Mar. 1, 1897).

If conclusive authority against the affirmance of the judgment at bar did not exist before, it has been furnished by this Court in the above case since the submission of this cause. In the course of an exhaustive discussion and comprehensive statement of what is due process of law as guaranteed by the Fourteenth Amendment and of the extent to which it reaches, this Court, quoting the statement of Mr. Justice Miller, speaking for the Court in *Davidson vs. New Orleans*, 96 U. S., 97, that a statute declaring in terms, without more, that the full and exclusive title to a described piece of land belonging to one person should be, and is hereby, vested in another person would, if effectual, deprive the former of his property without due process of law within the meaning of the Fourteenth Amendment, declares:

"Such an enactment would not receive judicial sanction in any country having a written constitution distributing

the powers of government among three co-ordinate departments and committing to the judiciary, expressly or by implication, authority to enforce the provisions of such constitution. It would be treated, not as an exertion of legislative power, but as a sentence—an act of spoliation."

And, further, this Court says:

"But if, as this Court has adjudged, a legislative enactment assuming arbitrarily to take the property of one individual and give it to another individual would not be due process of law as enjoined by the Fourteenth Amendment, it must be that the requirement of due process of law in that Amendment is applicable to the direct appropriation by the State to public use and without compensation of the private property of the citizen."

The provision of the West Virginia constitution arbitrarily takes the property of one individual and gives it to another individual, when the latter is available, and when not makes a direct appropriation of it to the State without compensation, without condemnation of the land or the owner, without anything. Both forbidden transactions are performed by one act which this Court declares not to be an exertion of legislative power, but an act of spoliation which cannot receive judicial sanction. It follows that the judgment of the circuit court should be reversed. So may it be.

Respectfully,

MAYNARD F. STILES,
Counsel for Plaintiff in Error.

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[redacted]

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SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

Some additional authorities and suggestions are worthy of consideration. In Mattox *vs.* United States, 157 U. S., 243, it is held that "the Constitution is to be interpreted in the light of the law as it existed at the time of its adoption. The rights guaranteed are such as were possessed by the British subject—such as his ancestors had inherited and defended since the days of Magna Charta."

The amendments as they became parts of the Constitution,

though operative only in the future, came under the same rule of interpretation and are equally referable to Magna Charta. Beyond all question, the term "due process of law" in the fourteenth amendment means exactly what it means in the fifth amendment and what "the law of the land" meant in Magna Charta. In each of these due process in the divestiture of title to land means *judicial* process, not a legislative sentence.

If it be suggested that the provision of the State constitution separating the legislative, executive, and judicial departments of government has no application in the present case because the same constitution enacts the legislative forfeiture complained of, it must be remembered that this constitution was adopted after the fourteenth amendment, and that the same provision separating said departments was contained in the constitution of 1863, upon which the State was admitted into the Union, and that the forfeiture provision was not contained in it. It is not conceivable that the State would have been received into the Union with a provision in its constitution so at variance with the long-established "law of the land" and the whole system of our American Government. Beyond doubt a change in such provision, had it been in the constitution, would have been required before receiving the State, as was required in article XI. The State, having been received into the Union and under the Constitution of the United States, the supreme law could no more avoid the letter or spirit of that Constitution by a change in its own than it could by an act of its legislature. Were this otherwise the Federal Constitution could be abrogated or evaded at the will of a State. But the constitution of 1863 prohibiting the exercise of judicial functions by legislative bodies, such exercise was not "due process in the State," nor under State law when the fourteenth amendment was adopted, and could not become such afterwards.

If judicial acts attempted by a State legislature are not due process, though not prohibited by the State constitu-

tion, similar acts attempted by a State constitutional convention, which is purely a legislative body, are not due process. We determine what is or what is not due process by a State, not by reference to its own constitution, but by reference to the Constitution of the United States and Magna Charta

The fourteenth amendment, upon its adoption became not only the law of the nation, but the law of the States as well—supreme and immutable—and thereafter no State had the power to do any act in conflict therewith, either by virtue of pre-existing or subsequently adopted legislation or otherwise. Whatever there was in State constitutions or law repugnant to that amendment was by it repealed, and all attempts at such legislation in the future were rendered inoperative.

In White *vs.* Crump & Shanklin, 19 W. Va., 583 (592), it was held that "before the ratification of the fourteenth amendment to the Constitution of the United States the legislature might, if authorized by the State constitution, divest vested rights of property where such rights were not vested by contract; that since the ratifications of said amendment such vested rights of property can only be divested by a State by due process of law."

When the forfeiture acts of Virginia were passed, there was no fourteenth amendment and no other constitutional restraint upon the power of the legislature in the matter of due process, but that amendment was in force six years before the present constitution of West Virginia was adopted.

ACQUIESCENCE IN INVALID ACTS.

The chief reliance of defendants in error seems to be upon a pretended general acquiescence in and acceptance of the forfeiture provision and the injury that would now result from declaring it void. Nothing could be more utterly unfounded, in fact, than this claim, and nothing could

be more untenable than the position that, were the facts as defendants in error would have them, that would constitute a sufficient or any reason for giving effect to a void provision.

If the provision in question was invalid at the moment it was adopted, it is impossible to conceive how, being *expressly prohibited* by the fourteenth amendment, it could ever become valid by being *supposed* for any length of time to be valid or by being permitted for any length of time to have effect as if valid. The Federal Constitution can never fall into disuse, die of inanition, or "lie in cold obstruction" while courts are sworn to support it, even though for a time some of the people, from ignorance or interest, forget or disregard its injunctions. How often or how long must a State violate the Constitution to gain the right to do so? How long or how often must a State impair the obligation of contracts, pass bills of attainder and *ex post facto* laws, grant titles of nobility, make treaties, emit bills of credit, make other than gold and silver coin a legal tender, make or enforce laws abridging the privileges and immunities of citizens of the United States, or deprive persons of life, liberty, or property without due process of law, to render its usurpation complete and the Constitution a dead letter, and take from this court the right and duty to declare such acts void? What and how extensive claims of interest under void acts are required to subvert the Constitution and silence this court? If this "forfeiture law" is not a law, but a violation of law, and to declare it such, instead of removing a perpetual source of possible wrong and confusion would be to bring tenfold the result defendants' counsel pretend to foresee, still were it not better that those results should follow than that this court should announce that under any circumstances a State may nullify the Constitution, and that this court cannot or will not prevent it at whatever consequence?

In Mabury *vs.* Madison, 1 Cranch, 176, Chief Justice

Marshall said of a proposition similar to that of defendants in error:

"It would be to declare that an act which according to the principles of our Government is entirely void is yet in practice completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which proposes to restrict their powers within narrow limits."

In Chesapeake & Ohio R. R. Co. *vs.* Miller, 19 W. Va., 408 (421), an act was held unconstitutional that had been re-enacted and been in operation for years, notwithstanding its generally accepted validity and acquiescence in its operation; upon which point the court says:

"The question in such case is, Has a wrong been committed? On page 70 of Cooley's Con. Lim. the author criticises the *ab convenienti* argument used by some courts, but says: 'It is believed, however, that in each of these cases an examination of the Constitution left in the minds of the judges sufficient doubt upon the question of its violation to warrant their looking elsewhere for aid in interpretation, and that the cases are not in conflict with the general rules as above laid down. Acquiescence for however great a length of time cannot legalize a clear usurpation of power where the people have plainly expressed their will in the Constitution and have appointed judicial tribunals to enforce it. A power is frequently yielded to merely because it is claimed; and it may be exercised for a long period in violation of the constitutional prohibition before the mischief which the Constitution was designed to guard against may appear, or before any one may be sufficiently interested in the subject to raise the question; but these circumstances cannot be allowed to sanction a clear infraction of the Constitution. We think we allow to contemporary and practical construction its full legitimate force when we suffer it, where it is clear and uniform, to solve in its own favor the doubts which arise on reading the instrument to be construed.'"

See also De Chartelleux *vs.* Fairchild, 3 Harris (15 Pa.,), 20; *Ex parte Milligan*, 4 Wall., 1.

To give operation to an invalid act divesting titles because it has been treated as valid in affairs or proceedings with which the party finally complaining was not connected and had no opportunity to object would in itself deprive him of property without due process of law.

I have said so much as I have upon this subject, not because either the record or the facts outside the record justify defendants in error in advancing the contention of acquiescence or inconvenience, but because they do in fact urge it.

DUE PROCESS IN COLLATERAL PROCEEDINGS.

If the requirement of due process of law were met by the regularity of a proceeding other than that by which the deprivation is had, that requirement would lose all force, for it would result that no matter by what travesty upon law or justice a man might be imprisoned, he could not be released if the *habeas corpus* proceedings resorted to for that purpose were only in due form; nor by what usurpation of authority, with or without color of law, the vesting of the title to his property in another was attempted, if the subsequent suit by that other to get possession followed established forms. "Due process" applies to the very deprivation, and the want of it cannot be supplied by subsequent independent proceedings. This plaintiff in error was deprived of no property in the action of ejectment, if the instruction of the court was right, for according to that instruction his grantor had been deprived of that property by the Constitution before the suit and before the deed to plaintiff.

In Moore *vs.* Schoppert, 22 W. Va., 282, which was an action of ejectment, it is held that "the charter of a corporation does not expire by reason of acts of omission or commission on the part of the corporation, even where they constitute a sufficient ground for declaring a forfeiture; but the franchise continues in full force until a forfeiture is claimed by the State, and this can only be done in a proper

legal proceeding, by which the cause of forfeiture is ascertained and a forfeiture adjudged." And it is also held that an *ex parte* order of the county court taking charge of so much of the company's property as lies in the county, made without notice, would not, if it were so intended, transfer to said county (which claimed under an act of the legislature), nor divest any right or title of the corporation.

ESTOPPEL OF STATE.

A State, as well as individuals, may be estopped by its acts, conduct, silence, and acquiescence.

State *vs.* Flint, &c., R. R. Co., 89 Mich., 481; Commonwealth *vs.* Andre, 3 Pick., 224; State *vs.* Bailey, 19 Ind., 452; Cahn *vs.* Barnes, 5 Fed. R., 326–334; Indiana *vs.* Milk, 11 Fed. R., 389, 396, 397; Enfield *vs.* Permit, 5 N. C., 280; Fletcher *vs.* Peck, 6 Cranch, 339; Bigelow on Estoppel, 349; U. S. *vs.* McLochlin, 30 Fed. R., 147 (161, 162); Clark *vs.* United States, 95 U. S., 539.

TAKING OF PRIVATE PROPERTY FOR PRIVATE USES.

I have heretofore discussed article XIII of the West Virginia constitution from the standpoint of its taking the property of one private person and bestowing it upon another. Upon such action the supreme court of West Virginia has spoken. In Warner *vs.* Martin, 21 W. Va., 548, that court says:

"In the first place, all the authorities concur in holding that private property can never be taken without consent of the owner for private use only, either with or without compensation. It is true there is neither in our constitution nor in the constitution of the other States any express provision forbidding that private property should be taken for the private use of another, or any constitutional provision forbidding the legislature to pass laws whereby the private property of one citizen may be taken and trans-

ferred to another for his private use without the consent of the owner. It was doubtless regarded as unnecessary to insert such a provision in the constitution or bill of rights, as the exercise of such an arbitrary power of transferring by legislation the property of one person to another without his consent was contrary to the fundamental principles of every republican government, and in a republican government neither the legislative, executive, nor judicial department can possess unlimited power. Such a power as that of taking the private property of one and transferring to another for his own use is not in its nature legislative, and it is only legislative power which by the Constitution is conferred on the legislature. Such an act, if passed by the legislature, would not in its nature be a law, but would really be an act of robbery—the exercise of an arbitrary power not conferred on the legislature."

OTHER AUTHORITIES.

The attention of the court is invited to the following cases bearing upon the questions involved in this cause:

Kilbourn *vs.* Thompson, 13 Otto, 168–182; Dodge *vs.* Woolsey, 18 How., 331; Norris *vs.* Doniphan, 4 Met. (Ky.), 385; Concord R. R. Co. *vs.* Greeley, 17 N. H., 55–57; Sullivan *vs.* Oneida, 61 Ill., 242–249; Bowman *vs.* Middleton, 1 Bay, 282; Claybrook *vs.* City of Owensboro, 16 Fed., 301; Davenport *vs.* Cloverport, 72 Fed., 689–693.

Respectfully,

MAYNARD F. STILES,
Counsel for Plaintiff in Error.

No. 157.

MAR 25 1898
JAMES H. McKENNEY,
CLERK

Sup. Ct. of Stiles for P. E.

Filed Mar. 25, 1898.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 157.

HENRY C. KING, PLAINTIFF IN ERROR,

vs.

M. B. MULLINS ET AL., DEFENDANTS IN ERROR.

BRIEF ON QUESTION OF JURISDICTION.

MAYNARD F. STILES,
Counsel for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 3-25-'98

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The ground of defendants' objection to the jurisdiction of this court is that the jurisdiction of the circuit court was invoked and depended upon the diversity of the citizenship of the parties, and that the constitutional question upon which the cause was decided was not presented by the declaration, but developed in the progress of the cause. They therefore contend that the cause should have been taken to the circuit court of appeals, whose judgment would be final, and not to this court. In support of this contention counsel cite Colo. Cent. Min'g Co. *vs.* Turck, 150 U. S., 138; Borgmeyer *vs.* Idler, 159 U. S., 408; *Ex parte* Jones, 164 U. S., 691. These cases, however, do not sustain the contention.

The error into which counsel for defendants in error have fallen is failure to note the plain distinction between the matters that confer jurisdiction upon the circuit courts and the matters that give jurisdiction to the circuit courts of appeal or to the Supreme Court upon appeal or writ of error.

The circuit courts of the United States are given jurisdiction, *inter alia*, of causes arising under the Constitution, laws, and treaties of the United States, whether the construction or application of the Constitution is involved, or the validity of the law or the construction or validity of the treaty is drawn in question or not; but in such cases the cause is reviewable in the Supreme Court by direct appeal or writ of error *only* when such construction or application is involved or such validity drawn in question, and it is not necessary to the jurisdiction of the Supreme Court that such question be raised or suggested by the bill or declaration, but it may be raised in subsequent proceeding and by either party. It is enough that when the jurisdiction of the Supreme Court is invoked the record of the cause discloses the constitutional question presented in good faith; that the construction or application of the Constitution was actually "involved" in the case, or that the validity of the law or construction or validity of the treaty was "drawn in question," or that a State constitution or law was claimed (not necessarily upon the face of the bill or declaration) to be in contravention of the Constitution of the United States, which necessarily "involves the construction or application of" that Constitution. If these questions appear in the record the Supreme Court has jurisdiction, no matter when or how they arose. Just as the circuit court may take (or at least formerly could take) jurisdiction upon removal, if at the time removal is sought a Federal question appears, although it did not exist at the commencement of the suit (150 U. S., 143; 128 U. S., 588), so may the Supreme Court take jurisdiction upon appeal, if when the jurisdiction of that court

is invoked the proper questions appear in the case. In other words, the right of the Supreme Court to review the judgments and decrees of the circuit courts by direct appeal or writ of error depends upon *the question involved* and not upon *the ground of jurisdiction of the circuit court.*

In Colo. Cent. Min'g Co. *vs.* Turck no constitutional question arose, for while the law of the United States came into the case, its validity was not challenged. So, too, with Borgmeyer *vs.* Idler, no such question arose, for as the court said: "It is unreasonable to contend that any question was raised directly touching the validity or construction" of the treaties, and of course "the writ of error could not have been entertained," had the case been brought to the Supreme Court. These cases deal with very different questions from the one now before the court, and are entirely consistent with the jurisdiction of the court in the present case.

In *Ex parte* Jones, no Federal question of any kind appeared at any time, first or last. The above cases are foreign to the question before us.

The exclusive jurisdiction of the Supreme Court to review upon direct appeal or writ of error the final judgment or decree of the circuit court "in any case that involves the construction or application of the Constitution of the United States," or "in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States," which latter case involves the former, without reference to the time or manner in which such question arose, has been repeatedly sustained by the Supreme Court and by the several circuit courts of appeals from the time of the adoption of the judiciary act of 1891 to the present, and is manifest from the very letter and spirit of that act. Some of the adjudications sustaining such jurisdiction in the present case are the following:

Hamilton *vs.* Bridsdale's Ex'rs, 2 U. S. A., 540; 53 Fed., 753; circuit court of appeals, eighth circuit, from western

district of Texas; action of trespass in ordinary form to recover land. Defendants by plea set up a judgment in proceedings to escheat, and plaintiff claimed that the proceedings and the act of the State legislature upon which they rested were in conflict with the Constitution of the United States. There was no reference in the declaration to the statute, and the circuit court could have had jurisdiction only by reason of diverse citizenship. The writ of error was not sued out until after six months. After noting delay in suing out the writ the court says:

"We notice further that *in the statement of the case*, which is agreed to be correct by counsel for both sides, and particularly *in the assignment of errors*, the case is shown to be one which involves the construction and application of the Constitution of the United States, as well as one in which a law of the State of Texas is claimed to be in contravention of the Constitution of the United States. Under the fifth section of the act of 1891, *supra*, it is provided 'that appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases: In any case that involves the construction or application of the Constitution of the United States, in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.' The sixth section of said act gives appellate jurisdiction to the circuit courts of appeals to review by appeal or by writ of error final decisions in the district courts and the existing circuit courts only in cases not provided for in the fifth section of the act.

"On either or both grounds it is our duty to dismiss the appeal."

World's Columbian Exposition case, 18 U. S. A., 42; 56 Fed., 654, circuit court of appeals, eighth circuit—motion to dismiss appeal for want of jurisdiction—held:

"The appeal was properly taken to this court (circuit court of appeals), as the construction or application of the Constitution was not involved nor the validity of any law of the United States drawn in question."

Chicago, Mil. & St. P. R'y Co. *vs.* Evans, 58 Fed., 433, U. S. circuit court of appeals, eighth circuit, in error to circuit court, N. dist. of Iowa—action against the railroad company for injuries to plaintiff and horses in transportation: "The complaint was in the ordinary form, and in one count therein plaintiff claimed damages both for his personal injuries and for the injuries sustained by his stock." The defendant relied upon a special contract with plaintiff limiting liability, the execution of which plaintiff in his reply admitted, but charged that the contract was void under the State statute. On the trial defendant offered the contract in evidence and plaintiff objected on the ground that the same was in violation of Iowa statute. The objection was sustained and contract excluded. Plaintiff got judgment, and defendant sued out a writ of error from circuit court of appeals. The court says in part:

"The only error assigned which is relied upon for a reversal has reference to the action of the court in excluding the aforesaid special contract, and that ruling is challenged solely on the ground that the Iowa statute above quoted is itself invalid under the Federal Constitution. * * * It will then be seen that the issue presented by the record is whether a law of the State of Iowa is in contravention of the Constitution of the United States, and that is a question which this court is without jurisdiction to decide."

The court quotes the fifth and sixth sections of the act of 1891, and says:

"There is no other provision of law, so far as we are aware, which gives this court the right to hear and determine a constitutional question such as arises in the case at bar." * * *

If there was "no other provision of law," then there was none at all, for the sections quoted give no such right.

The court further held that it was the evident intention of the act of 1891—

"To vest the Supreme Court of the United States with exclusive jurisdiction to entertain appeals and writs of error

for the review of cases which present constitutional questions such as are enumerated in the fourth, fifth, and sixth subdivisions of the fifth section of the act, and the same may be said with reference to the cases mentioned in the second and third subdivisions of the same section.

"In the case at bar the sole question presented for our consideration is whether the Iowa statute contravenes the Constitution of the United States; and, as this court has no jurisdiction to determine that question, especially when it is the sole issue presented by the record, it follows that the writ of error should be dismissed."

Here, again, diversity of citizenship of the parties was the sole ground of jurisdiction of the circuit court, the constitutional question being injected into the case by the defendant.

South Carolina election case, Green *vs.* Mills, 25 U. S. A., 383; 69 Fed., 852; appeal to circuit court of appeals, fourth circuit; opinion by Chief Justice:

* * * "We are of opinion that where the jurisdiction is not in issue, but the question of the constitutionality of a State law is raised and must necessarily be decided in the disposition of the case, there the case on final decree should be taken directly to the Supreme Court."

Hastings *vs.* Ames, 22 U. S. A., 485; 68 Fed., 726; circuit court of appeals, eighth circuit:

The principal and ultimate question was whether or not a State statute conflicted with the Constitution of the United States. The appeal was dismissed for want of jurisdiction. Appeal should have been to Supreme Court.

Barr *vs.* Mayor, etc., of City of New Brunswick, 39 U. S. A., 187; 72 Fed., 689; from district of New Jersey, circuit court of appeals, third circuit; bill to enjoin city and a railroad company from taking complainant's property under the power of eminent domain; bill dismissed; complainant appealed, and defendant moved to dismiss for want of jurisdiction.

The whole opinion is as follows:

"The only question in this appeal is whether the proposed acts of the appellees, the defendants below, under an ordinance of the city of New Brunswick, N. J., would be contrary to and in violation of the fourteenth amendment of the Constitution of the United States, in that the same would deprive the appellant of his property without due process of law. Clearly, the case is one which 'involves the construction or application of the Constitution of the United States' or in which 'the law of a State is claimed to be in contravention of the Constitution of the United States;' and therefore, under sections 5 and 6 of the act 'to establish circuit courts of appeal,' etc., approved March 3, 1891, this court has no jurisdiction to review the decision of the court below upon that question. (McLish *vs.* Roff, 141 U. S., 661; 12 Sup. Ct., 118; Law Ow Bew *vs.* U. S., 144 U. S., 47, 56; 12 Sup. Ct., 517.)

"The motion to dismiss the appeal must be allowed. Appeal dismissed."

It is but fair to state that in this case in the court below (67 Fed., 402) it appears that the constitutional question was disclosed by the bill; but the court of appeals declares in general terms its want of jurisdiction to review the constitutional question, and makes no reference to the manner in which it arose, which is not referred to by the court.

Penn. Mut. Life Ins. Co. *vs.* The City of Austin; decided by Supreme Court January 3, 1898; appeal from decree of circuit court for western district of Texas:

It was argued that in order to give the right of direct appeal to this court "it must affirmatively appear upon the face of the complainant's bill that there was involved in this case a Federal question, the determination of which was essential to a correct decision of the case;" which argument this court disposed of as follows:

"But the words of the statute which empower this court to review directly the action of the circuit court are that such power shall exist wherever it is claimed on the record that

a law of a State is in contravention of the Federal Constitution."

Bills of exception are a part of the "record;" made so by express terms.

Holder *vs.* Aultman, Miller & Co., decided by Supreme Court January 10, 1898; error to United States circuit court for the eastern district of Michigan:

Plaintiff below, an Ohio corporation, brought an action of assumpsit against Holder, defendant below, a citizen of Michigan, to recover the price of agricultural machines furnished by plaintiff to defendant and sold by him under a contract to sell same and account to plaintiff for proceeds. Defendant contended that the contract was void under the provisions of a statute of Michigan, and the plaintiff "claimed" that the statute was in contravention of the Constitution of the United States, and it was so held. Judgment was given for plaintiff for $5,052.56, and the defendant sued out writ of error from this court.

There was nothing in the declaration to present or foreshadow the constitutional question or any Federal question, and the sole ground upon which the circuit court acquired jurisdiction was diversity of citizenship of the parties. The constitutional question developed in the progress of the case and when defendant interposed his defense and could not aid the jurisdiction of that court.

This court found it unnecessary to decide whether or not the statute was in conflict with the Federal Constitution, because, as it held, the contract did not come within its operation; but the claim of such conflict being made and passed upon in the circuit court, this court held:

"This was, therefore, a 'case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States,' and was rightly brought directly to this court by writ of error under the act of March 3, 1891."

In none of the foregoing actions at law was the constitutional question presented or suggested by plaintiff's statement of his cause, and the only ground upon which the circuit court could have had jurisdiction when action was brought, was diversity of citizenship of the parties, and in each of them, just as in the case at bar, the State law was brought into the case by the *defendant;* whereupon it was *then* claimed by the plaintiff to be in contravention of the Constitution of the United States.

In many actions at law, under prescribed or customary forms of pleading, it is impossible to present, as a ground of jurisdiction of the circuit court, the question that gives the Supreme Court jurisdiction for direct review, and that question can only develop upon the trial of the cause, in which case, although the constitutional question is the only one to be reviewed, as may well happen, the cause must, if Mr. Conrad is right, go to the circuit court of appeals, which has declared its want of jurisdiction to decide constitutional questions. It would thus result that, there being, according to Mr. Conrad's contention, no direct recourse to the Supreme Court and no jurisdiction in the circuit courts of appeals to decide the question, as they have decided, there could be no review of the decision of the circuit court anywhere. The judiciary act of 1891 contains no such absurdity.

The declaration in this case is the common form, and all the plaintiff is required to state is his estate in the land and the unlawful withholding by defendant, and the latter allegation need not be proven. The only plea permitted is the general issue, "not guilty." (Code W. Va., chap. 90.)

Until the trial nothing is disclosed of the ground of defense, and, while plaintiff may conjecture what that may be, he is not informed by the plea and cannot know, and often encounters a surprise.

It was suggested by counsel for defendants in error upon the argument, that plaintiff might have declared in his

declaration "that defendants claimed title under an invalid State statute," &c., stating the constitutional question as the ground of jurisdiction of the circuit court. Had plaintiff done so, nothing is more certain than that defendant would have defeated the jurisdiction by failing to set up such claim, and as to these defendants in error the allegation would not have been true in point of fact. McClintock claimed title to the De Witt Clinton grant of 142,000 acres, granted in 1796, and whose exterior lines, embracing 182,000 acres, interlock with plaintiff's grant to the extent of upward of 39,000 acres, which plaintiff contended was the 40,000 acres, or part of same, reserved out of said Clinton grant. In any event, the Clinton grant having been forfeited to the State of Virginia under the act of 1835, and never having been redeemed, and no taxes having been paid on the part in interlock since that time, and all taxes having been paid on plaintiff's grant from 1838 to the time of the war and from 1863 to 1883, McClintock could not take the forfeited Randall title, if forfeited, and could not and did not claim title under the constitution or any law, valid or invalid, of West Virginia.

Mullins claimed about 6,000 acres of wild land inside of plaintiff's grant, sold by the commissioner of school lands of Logan county after Randall's redemption in 1883 and before the expiration of five years thereafter, under *ex parte* administrative proceedings for the sale of the "waste and unappropriated lands" of the State. The commissioner had the authority to proceed in the manner he did against lands that were in fact waste and unappropriated: but the land actually sold by him was not waste and unappropriated, nor forfeited under any law, void or valid, nor belonging in any way to the State. The law was not invalid, but was exercised upon land not subject to its operation. Mullins was not in a position to take any forfeited title, and could not and did not claim title under the Constitution or any law of the State of which plaintiff could com-

plain. His claim of title was not old enough to bring him within the operation of section 3, article XIII, of the Constitution, and he had no actual possession of that land; and plaintiff upon the trial renounced claim to the other land of Mullins, of which he had good possession.

The situation of the other defendants in the declaration is not essentially different; but this serves to illustrate that the suggestion of counsel is impracticable. The constitutional question was wholly within the control of defendants to inject it into the case or keep it out by setting up the forfeiture of plaintiff's title or not, as they saw fit. It did not rest with the plaintiff. So the criticism of Mr. Conrad that the plaintiff "did not apprise the defendants of this theory [want of due process] by appropriate averment in his declaration" comes without force. Defendants must be prepared to defend the law upon which they base their defense, and the contention of plaintiff as to the invalidity of section 6, article XIII, of the constitution of West Virginia, if it ever was a surprise to defendants, had ceased to be such during the year and a half plaintiff was trying to redeem in the suits mentioned by counsel for defendants in error before this suit was brought.

The constitutional question came into the case in the only way it could get in. It was the question that disposed of the case in the circuit court; it and the question of evidence by which it was presented are the only ones for this court to decide; it appears upon the record, in the bills of exception "made part of the record," and in the statement of the case and assignment of errors, as was said by the court in *Hamilton vs. Bridsdale's Ex'rs, supra.*

The case is parallel in all essential respects to the law actions above cited, which both the circuit courts of appeals and this court have held to involve the construction or application of the Constitution of the United States and in which the constitution or law of a State was claimed to be in contravention of the Constitution of the United States and

of which this court has exclusive jurisdiction and by direct writ of error.

It is submitted that this cause is properly here and that this court has jurisdiction to determine it.

I trust it is excusable at this time, as matter of personal privilege, in reply to supposition of Judge Ferguson (page 33 of his last argument) that Mr. King's purchase of the land in question was upon my advice that the forfeiture law was invalid, to say that I had no knowledge of the existence of either Mr. King or the forfeiture law or the land in question until after his purchase; but had I known them all, I should have advised him without hesitation that the forfeiture law was invalid, but not to trust a dollar of his money in a State that would adopt such laws. Had he known the facts, such advice would have been needless.

I beg also to call attention to Owings *vs.* Speed, 5 Wheat., 420, which I have inadvertently omitted to mention, as showing the power of a State over private property when not restrained by the Federal Constitution, it being held in that case that before the Federal Constitution went into operation a State could impair the obligation of a contract and divest vested rights by act of legislation. So the State could divest vested rights without "due process," if not restrained by its own constitution, before the fourteenth amendment, but not after.

Respectfully, MAYNARD F. STILES,
Counsel for Plaintiff in Error.